

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

---

Vonage Holdings Corporation,

Civil No. 03-5287 (MJD/JGL)

Plaintiff,

v.

**MEMORANDUM AND ORDER**

The Minnesota Public Utilities Commission,  
and Leroy Koppendrayner, Gregory Scott, Phyllis Reha,  
and R. Marshall Johnson, in their official capacities  
as the commissioners of the Minnesota Public Utilities  
Commission and not as individuals,

Defendants.

---

Ky E. Kirby, Swidler Berlin Shereff Friedman, LLP, Gregory Merz, Gray, Plant,  
Mooty, Mooty & Bennett, P.A., for Plaintiff.

Steven H. Alpert, Assistant Minnesota Attorney General, for Defendants.

Robert E. Cattanaach, Theresa M. Bevilacqua, Dorsey & Whitney LLP, for Qwest.

Karen Finstad Hammel, Linda S. Jensen, Assistant Attorneys General, for the  
Minnesota Department of Commerce.

---

## **I. INTRODUCTION**

This matter is before the Court on (1) Qwest Corporation (“Qwest”)’s motion to intervene and to amend judgment; (2) the Minnesota Public Utilities Commission (“MPUC”)’s motion for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial; and (3) the Minnesota Department of Commerce (“MDOC”)’s motion to intervene. For the reasons discussed below, the Court denies all motions.

## **I. BACKGROUND**

Although the Court's October 16, 2003 Order ("Order") sets out a more comprehensive version of the factual background underlying the motions currently before the Court, a brief reiteration of key facts is necessary. Vonage Holdings Corporation ("Vonage") markets and sells Vonage DigitalVoice, a service that permits voice communication via a broadband Internet connection. While a person using a traditional telephone is connected to the public switched telephone network ("PSTN") operated by local telephone companies, Vonage's service uses a technology called Voice over Internet Protocol ("VoIP"). The MDOC investigated Vonage's services and on July 15, 2003, it filed a complaint with the MPUC, alleging that Vonage failed to comply with laws regulating telephone companies. Eventually, the MPUC issued an order concluding that, within thirty days, Vonage was required to comply with Minnesota statutes and rules regarding the offering of telephone service. See In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003) (order finding jurisdiction and requiring compliance). Vonage then filed a complaint with this Court seeking a preliminary injunction.

On October 16, 2003, the Court issued an order permanently enjoining the Minnesota Public Utilities Commission ("MPUC") from regulating Vonage as a

telephone company. As noted above, post-judgment motions are now before the Court for consideration.

## **II. DISCUSSION**

### **A. Qwest motions**

Qwest moves the Court to intervene, both as a matter of right and by permissive intervention. It also requests that the Court amend its judgment.

#### **1. Intervention as a matter of right**

A party requesting intervention as a matter of right must establish that the elements of Fed. R. Civ. P. 24(a)(2) are met. Chiglo v. City of Preston, 104 F.3d 185, 187 (8th Cir. 1997). Rule 24(a)(2) requires that (1) an intervenor has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately protected by the existing parties to the litigation. A motion to intervene must also be timely. United States v. Union Elec. Co., 64 F.3d 1152, 1158-59 (8th Cir. 1995).

Rule 24(a)(2) also requires that a prospective intervenor demonstrate that it has Article III standing. See Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir. 1996) (“We conclude that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court.”). Constitutional standing requires (1) an injury in fact, which is an invasion of a legally protected interest that is concrete, particularized, and either actual or imminent; (2) “a causal connection between the alleged injury and the conduct being challenged”; and (3)

redressability. *Id.* at 1301 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 561, 112 S.Ct. 2130 (1992)).

**a. Standing**

Vonage argues that Qwest is ineligible to intervene because it cannot demonstrate that it has an injury in fact. The most concrete injury alleged by Qwest is that the Court’s Order “*could* permit Vonage to claim that it is exempt from paying” telecommunications carriers like Qwest for using their local exchange switching facilities. (emphasis added). The Court concludes that Qwest’s claimed injury falls short of the requirement that it be “concrete and particularized” and “actual or imminent.” Lujan, 504 U.S. at 560, 112 S.Ct. at 2136. Qwest has not demonstrated particularized injury it suffered as a direct result of the Order, considering that the Court’s Order only applied directly to Vonage. Any indirect harm claimed by Qwest, such as a loss of fees, is speculative, and not sufficiently concrete to constitute an injury in fact. The Court thus concludes that Qwest does not have Article III standing to intervene.

**b. Timeliness**

“If the applicant’s motion to intervene was not timely filed, the applicant is barred from intervening.” Union Elec., 64 F.3d at 1159. “The general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner.” U.S. v. Associated Milk Producers, Inc. 534 F.2d 113, 116 (8th Cir. 1976) (citations omitted). In determining whether a motion is timely, the

Court must consider three factors: the reason for delay by the proposed intervenor, how far the litigation has progressed before the motion to intervene is filed, and how much prejudice the delay in seeking intervention may cause to other parties if intervention is allowed. Union Elec., 64 F.3d at 1158-59.

Qwest argues that its motion is timely, even though it moves to intervene after the Court issued its Order. Qwest claims that it had no reason to believe that Vonage's motion for a preliminary injunction would become one for a permanent injunction, and upon issuance of the Court's order, Qwest acted promptly in filing its motion to intervene. Qwest also asserts that its intervention will not impede the process of the litigation or cause delays. Vonage argues that Qwest's motion is untimely, asserting that Qwest sought to intervene after judgment without offering a legitimate reason for its delay.

On the first page of its Amended Complaint, Vonage sought "preliminary and *permanent* injunctive relief." (emphasis added). Notwithstanding its title, Vonage's Motion for Preliminary Injunction contains the same language as the Complaint. Considering that Qwest admits that it was aware of the preliminary injunction motion before the Court issued its Order, it must have had notice of this language. The justification Qwest offers for its delay is not sufficient to permit post-Order intervention. As for the progression of the litigation, Qwest moves for post-judgment intervention, which weighs in Vonage's favor. Finally, although conversion of the permanent injunction to a preliminary injunction would not substantially prejudice Vonage, future litigation would require it to address

arguments and incur further legal costs for an entirely separate party than the MPUC. The Court concludes that Qwest's motion is untimely.

**c. Interest in subject matter**

Qwest also argues that it has a substantial interest in the subject matter of this case. Qwest asserts that it is a direct competitor with Vonage and that classifying Vonage as an information service provider would prevent Qwest from obtaining reasonable compensation for using Qwest's facilities. Although the Court acknowledges Qwest's interest in how the law applies to Vonage, as noted above in the discussion regarding Article III standing, this interest is not sufficient to permit intervention.

**d. Interests not represented by parties before the Court**

Qwest contends that its interest in policy and regulatory issues are distinct from the parties to this action. Vonage asserts that Qwest's interests were adequately represented by the MPUC. Because Qwest requests a stay, and because the MPUC also requested a stay, Vonage claims that Qwest's interests were represented in these proceedings. The MPUC argues that Qwest's motion should be granted, echoing Qwest's arguments.

The Court acknowledges that Qwest has a distinct interest for which the MPUC did not advocate. It is clear that Qwest, unlike the MPUC, does not request that the Court alter its conclusion that Vonage's services constitute information services. Qwest simply wants the FCC to address this issue because of the weighty policy implications involved with regulation of VoIP. However, this

procedural remedy and accompanying argument was offered by the MPUC in the proceedings leading up the Court's Order. The Court therefore concludes that Qwest's interests are adequately represented by a party currently before the Court.

## **2. Permissive intervention**

In the alternative, Qwest argues that under Fed. R. Civ. P. 24(b), it should be permitted to intervene. Vonage contends that Qwest fails to show that it is entitled to do so. Rule 24(b) provides that

[u]pon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"Permissive intervention to litigate a claim on the merits under Rule 24(b) requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir. 1992) (citation omitted). As discussed above, Qwest has not made a showing that there is an independent ground for jurisdiction, i.e. Article III standing, and its motion is untimely. The Court thus concludes that permissive is not appropriate. The Court thus need not address Qwest's motion to amend judgment.



**A. MPUC motions**

The MPUC moves the Court for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial. In the alternative, the MPUC argues that the Court should convert its permanent injunction into a temporary one, and permit discovery. According to the MPUC, the court should amend its findings of fact “to indicate that it is unclear whether Vonage is a telecommunication service or an information service.”

The MPUC essentially asserts that the Court erred when it determined that Vonage offers information services. Citing evidence that was not before the Court when it issued its October 16th order, Qwest asserts that Vonage’s services are not principally on the Internet and claims that Vonage’s CEO stated that 97% of its calls touch the PSTN. The MPUC further states that because Vonage provides call forwarding, it provides a form of phone-to-phone telephony that should be regulated. The MPUC asserts that the equipment provided by Vonage may not qualify as CPE under the FCC’s interpretation, and that this issue is at least a material fact question. The MPUC also requests further discovery on the issue of whether Vonage can comply with 911 requirements. Vonage responds that the undisputed facts demonstrate that Vonage does not provide phone-to-phone IP telephony.

Even if the Court declines to alter its decision that Vonage provides information services, the MPUC argues that the Court should amend its order to reflect that federal law does not preempt state regulation of 911 service.

According to the MPUC, the statutory scheme addressing 911 service does not show that Congress intended to prohibit state regulation of telephone service providers that are not telecommunications carriers. The MPUC asserts that 47 U.S.C. § 251(e)(3) applies broadly, and includes all telephone services, even if they are provided via information services. Section 251(e)(3) provides that the 911 “designation shall apply to both wireline and wireless telephone service.” Because section 251(e)(3) was adopted in 1999, the MPUC contends, and because VoIP was available by that time, Congress intended to subject VoIP telephone services to 911 requirements.

Further, the MPUC contends that FCC rules found in 47 C.F.R. §§64.3000-64.3004 place importance on a customer’s intent to call 911, regardless of the technology underlying the call.

Vonage responds that it does not matter whether Vonage is capable of complying with 911 requirements, because the Court found that Vonage’s services can not be subject to the requirements. Vonage further argues that state 911 regulations are preempted because the term “telephone service” has not been shown to include information services. Vonage claims that “telephone service” actually means “telecommunications services.”

The Court declines to amend any aspect of its Order, and concludes that a new trial is not necessary. The MPUC bases its argument on information that was not part of the record when the court issued its Order, and thus could not have considered. Further, even if the Court had considered such information as

evidence, its conclusion would have been the same. For the reasons explained in its Order, whether calls come into contact with the PSTN does not alter the Court's conclusion that Vonage's services constitute information services. The Court declines to alter its conclusion that state 911 regulations are preempted. The MPUC has not demonstrated that the basis upon which the Court's Order was founded—that Congress intended information services to remain unregulated—is somehow impacted by 47 U.S.C. § 251(e)(3) and 47 C.F.R. §§64.3000-64.3004.

**B. MDOC motion**

MDOC seeks permissive intervention in order to participate in future proceedings resulting from any ruling the Court issues with regard to pending motions. In addition, MDOC supports the motions of the MPUC and Qwest to amend the Court's permanent injunction and to convert it to a preliminary injunction.

Under Minn. Stat. §§ 216A.01 and 216A.07, subd. 2, the MDOC has a duty to enforce Chapters 216A, 216B, 237 and any order issued by the MPUC, and has the authority to participate in MPUC proceedings. Integral to the arguments of MDOC is the distinction between it and the MPUC. According to MDOC, its role is to be an advocate before the MPUC, while the MPUC possesses the quasi-judicial role of considering the parties' arguments. Minn. Stat. § 216A.02, subd. 4.

Unless it is allowed to intervene, MDOC contends, it may be unable to fulfill its duty pursuant to statute. MDOC also suggests that its intervention is required to properly develop an evidentiary record.

MDOC contends that its motion is timely because it did not know at the time that Vonage filed its action before the Court that a permanent injunction would be issued. The Court concludes that MDOC's motion is untimely.

Considering that the MDOC filed the complaint against Vonage with the MPUC, it was well aware of the contours and implications of this case. As noted above with regard to Qwest, Vonage's complaint and motion gave MDOC notice of Vonage's intent to seek permanent relief, and thus its arguments to the contrary fail. Further, the Court concludes that MDOC does not have a ground for jurisdiction that is independent from the MPUC. Although the MDOC has identified a distinction in terms of the statutory roles of the two agencies, the Court does not consider that distinction sufficient to justify intervention.

Accordingly, based on all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that

1. Qwest's motion to intervene and to amend judgment is **DENIED**;
2. the MPUC's motion for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial is **DENIED**; and
3. the MDOC's motion to intervene is **DENIED**.

Date: January 14, 2004

---

Michael J. Davis  
United States District Court Judge